

The Administrative Law Judge (ALJ) found claimant injured his left elbow when he fell while working for the respondent on December 21, 1998. Respondent provided medical treatment for claimant's left elbow injury and claimant eventually returned to work on or about March 19, 1999. The ALJ further found, after claimant returned to work, he overused his right shoulder because of the left elbow injury. Thus, the ALJ found that as a natural and probable consequence of the compensable left elbow injury claimant sustained a right shoulder injury resulting in a 8.5 percent whole body permanent functional

impairment. The ALJ also found that claimant left respondent's employment on or about July 1, 1999, and then found other appropriate employment at a comparable wage on September 23, 1999, working as a service manager at an automobile repair center. For that period, the ALJ found claimant entitled to a 64.5 percent work disability based on a 29 percent task loss and a 100 percent wage loss.

On appeal, respondent contends claimant failed to prove he sustained a permanent injury to his right shoulder as a result of overuse because of his compensable left elbow injury. Accordingly, respondent argues that claimant's entitlement to permanent partial disability should be based on a scheduled left upper extremity injury only instead of an unscheduled whole body injury. Furthermore, respondent contends, if the Board finds that claimant is entitled to a whole body injury, then his permanent partial general disability is limited to permanent functional impairment because respondent terminated claimant for cause not related to his work injury.

In contrast, claimant agrees with the ALJ's finding that he proved a whole body injury and that he is entitled to a work disability. But claimant also contends he is entitled to a work disability after he left the automobile repair center job on June 10, 2000.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and the parties' oral arguments, the Board finds the ALJ's Award should be affirmed.

The ALJ's Award sets out findings of fact and conclusions of law in some detail. It is not necessary to repeat those findings and conclusions in this Order. Except as to the ALJ's finding that claimant was not entitled to permanent partial general disability benefits until after he was terminated by the respondent, the Board adopts the findings and conclusions of the ALJ as its own as if specifically set forth herein.

There is no dispute in this case that claimant fell at work on December 21, 1998, and fractured his left elbow. Respondent furnished claimant with medical treatment for the left elbow injury through orthopedic surgeon Randall L. Lais, M.D. of Wichita, Kansas. Dr. Lais operated on claimant's left elbow on December 23, 1998, provided claimant with post-operative treatment and released claimant with no restrictions to return to work on March 18, 1999.

Dr. Lais then had claimant undergo a Functional Capacity Evaluation (FCE) on June 17, 1999. The last time Dr. Lais saw claimant was on August 11, 1999, when he assessed claimant with a 7 percent permanent functional impairment of the left upper extremity in accordance with the AMA, Guides for the Evaluation of Permanent Impairment, Fourth Edition.

Dr. Lais testified, and his medical records plus the FCE verified, that claimant made no right shoulder complaints while he was treated by Dr. Lais. But claimant testified he started having right shoulder complaints after he returned to work for respondent because he overused his right shoulder to compensate for the left elbow injury.

Two other physicians testified in this case, Pedro A. Murati, M.D., who evaluated claimant at claimant's attorney's request and C. Reiff Brown, M.D., who performed an independent medical evaluation of claimant at the request of the ALJ. Both of those physicians found claimant had sustained a permanent right shoulder injury as a result of claimant overusing his right arm to compensate for the injury to his left elbow. The Board agrees with the ALJ's conclusion that those two physicians' opinions, along with claimant's testimony, are persuasive and prove that claimant injured his right shoulder as a natural and probable consequence of his compensable left elbow injury resulting in a nonscheduled injury. Thus, compensation should be awarded pursuant to K.S.A. 1998 Supp. 44-510e.¹

Accordingly, as stipulated by the parties, permanent partial general disability benefits should be computed based on the original left elbow accident date of December 21, 1998. Therefore, after claimant was released to return to work for the respondent on March 18, 1999, he was then entitled to permanent partial general disability benefits based on the ALJ's finding that he had sustained an 8.5 percent permanent functional impairment until he left respondent's employment on or about July 1, 1999.

The Board also finds that claimant left his employment with the respondent by mutual agreement because claimant was unable to continue to perform the heavy work activities at a production level that would justify the wage claimant was earning.

Respondent's owner, who was claimant's supervisor, also testified in this case. He established that claimant had some performance problems before his injury. But those performance problems accelerated after the injury when claimant returned to work because claimant could no longer perform the heavy work.

Claimant then made a good faith effort to find appropriate employment. His job search efforts were successful and, on September 23, 1999, he went to work as a service manager at an automobile repair center. Claimant was earning a wage at the automobile repair center in excess of the wage he earned while working for the respondent. On the date of the regular hearing, September 11, 2000, claimant was not employed and had not been employed since he had left the automobile repair service job on June 10, 2000.

The Board finds, however, that claimant's testimony established that he left the automobile repair center job not because of his work injuries but because he had some personality problems with other employees. In fact, after a review of claimant's testimony

¹ See Woodward v. Beech Aircraft Corp., 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

in regard to him leaving that employment, the Board finds it is unclear whether claimant was terminated or he left voluntarily. Claimant does not allege that the automobile repair center acted in bad faith or that he was wrongfully terminated. Furthermore, claimant admits that his work-related injuries did not result in his termination. Because the record is unclear that this was anything other than a voluntary quit, claimant is not entitled to a work disability. And he is limited to an award based only upon permanent functional impairment.²

In this case, before claimant left the automobile repair service job on June 10, 2000, he already was entitled to an award of 35.28 weeks of permanent partial general disability benefits based on an 8.5 percent permanent functional impairment. Therefore, claimant is not entitled to any additional weeks of permanent partial general disability because the weeks of the 8.5 percent functional disability have been awarded.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Nelsonna Potts Barnes' April 12, 2001, Award should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stephen Jones, Attorney for Claimant
Eric Kuhn, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

² See Ramirez v. Excel Corp., 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. ____ (1999).